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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93727; File No. SR-MEMX-2021-10]

Self-Regulatory Organizations; MEMX LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Establish a Retail Midpoint Liquidity Program

December 7, 2021

I.   Introduction

On August 18, 2021, MEMX LLC ("MEMX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to establish a Retail Midpoint Liquidity Program ("Program"). The proposed rule change was published for comment in the *Federal Register* on September 8, 2021.[3] On October 19, 2021, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[4] This order

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1   15 U.S.C. 78s(b)(1).

2   17 CFR 240.19b-4.

3   See Securities Exchange Act Release No. 92844 (September 1, 2021), 86 FR 50411 (September 8, 2021).

4   See Securities Exchange Act Release No. 93383 (October 19, 2021), 86 FR 58964 (October 25, 2021).

institutes proceedings under Section 19(b)(2)(B) of the Exchange Act[5] to determine whether to approve or disapprove the proposed rule change.

II.   Description of the Proposed Rule Change

The Exchange proposes to establish a Retail Midpoint Liquidity Program to provide retail investors with enhanced price improvement opportunities at the midpoint of the national best bid and offer ("Midpoint Price") against a limited group of liquidity providers on the Exchange. Specifically, the Exchange proposes to allow Retail Member Organizations ("RMOs") to submit a new type of order on behalf of retail investors that is designed to execute at the Midpoint Price (a "Retail Midpoint Order"). Contra-side liquidity would be provided almost exclusively by a new order type, called a Retail Midpoint Liquidity Order ("RML Order"), which any Exchange user would be permitted to submit.[6] The Exchange would permit users to elect whether to have their RML Orders count towards a new Retail Liquidity Identifier, which MEMX would disseminate through its proprietary market data feeds and the appropriate securities information processor ("SIP") when such elected RML Order interest aggregates to form at least one round lot for a particular security.

Defined Terms and the Retail Liquidity Identifier

Under the proposal, "Retail Midpoint Order" would be defined as a Retail Order

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[5]   15 U.S.C. 78s(b)(2)(B).

[6]   As discussed below, Retail Midpoint Orders also would execute against displayable odd lot orders priced more aggressively than the Midpoint Price and non-displayed orders priced more aggressively than the Midpoint Price. Retail Midpoint Orders would not be eligible to execute against other types of midpoint interest, such as Midpoint Peg Orders (defined below).

submitted by an RMO that is a Pegged Order[7] with a Midpoint Peg[8] instruction

("Midpoint Peg Order") and that is only eligible to execute against RML Orders and

other orders priced more aggressively than the Midpoint Price through the execution

process described in proposed Exchange Rule 11.22(c). As proposed, a Retail Midpoint

Order must have a time-in-force ("TIF") instruction of IOC.[9] Further, an "RML Order"

would be defined as a Midpoint Peg Order that is only eligible to execute against Retail

Midpoint Orders through the execution process described in proposed Exchange Rule

11.22(c). As proposed, an RML Order must have a TIF instruction of Day,[10] RHO,[11] or

GTT[12] and may not include a Minimum Execution Quantity[13] instruction. According to

the Exchange, the purpose of limiting Retail Midpoint Orders and RML Orders to

interacting with each other (subject to the exception of Retail Midpoint Orders being

eligible to execute against other orders priced more aggressively than the Midpoint Price)

is that the proposed Program is designed to provide a mechanism whereby liquidity-

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[7]   Pegged Orders are described in Exchange Rules 11.6(h) and 11.8(c) and generally
        defined as an order that is pegged to a reference price and automatically re-prices
        in response to changes in the national best bid and offer.

[8]   A Midpoint Peg instruction is an instruction that may be placed on a Pegged
        Order that instructs the Exchange to peg the order to the Midpoint Price. See
        Exchange Rule 11.6(h)(2).

[9]   "IOC" is an instruction the user may attach to an order stating the order is to be
        executed in whole or in part as soon as such order is received, and the portion not
        executed immediately on the Exchange or another trading center is treated as
        cancelled and is not posted to the MEMX Book. See Exchange Rule 11.6(o)(1).
        The term "MEMX Book" refers to the MEMX system's electronic file of orders.
        See Exchange Rule 1.5(q).

[10]   See Exchange Rule 11.6(o)(2).

[11]   See Exchange Rule 11.6(o)(5).

[12]   See Exchange Rule 11.6(o)(4).

[13]   See Exchange Rule 11.6(f).

providing users can provide price-improving liquidity at the Midpoint Price specifically

to retail investors, and liquidity-removing RMOs submitting orders on behalf of retail

investors can interact with such price-improving liquidity at the Midpoint Price "in a

deterministic manner."[14]

The Exchange proposes to disseminate a Retail Liquidity Identifier through the

Exchange's proprietary market data feeds, MEMOIR Depth[15] and MEMOIR Top,[16] and

the appropriate SIP when designated[17] RML Order interest, aggregated to form at least

one round lot for a particular security, is available, provided that such designated RML

Order interest is resting at the Midpoint Price[18] and is priced at least $0.001 better than

the national best bid ("NBB") or national best offer ("NBO").[19] The Retail Liquidity

Identifier would reflect the symbol and the side (buy and/or sell) of the designated RML

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[14]   See Notice, supra note 3, at 50413.

[15]   See Exchange Rule 13.8(a).

[16]   See Exchange Rule 13.8(b).

[17]   The term "designated" indicates that users submitting RML Orders have the
         option to either include their RML Orders in the Retail Liquidity Identifier or not.
         See also infra note 21 and accompanying text.

[18]   The Exchange notes that an RML Order could have a limit price that is less
         aggressive than the Midpoint Price in which case it would not be eligible to trade
         with an incoming Retail Midpoint Order and therefore would not be included for
         purposes of Retail Liquidity Identifier dissemination since it would not reflect
         interest available to trade with Retail Midpoint Orders. See Notice, supra note 3,
         at 50414.

[19]   The Exchange explains that because RML Orders are proposed to be only
         Midpoint Peg Orders, they will always represent at least $0.001 price
         improvement over the NBB or NBO, with two exceptions: (1) In a locked or
         crossed market; and (2) a sub-dollar security when the security's spread is less
         than $0.002. See id. The Exchange would only disseminate the Retail Liquidity
         Identifier for sub-dollar securities if the spread in the security is greater than or
         equal to $0.002, meaning the Midpoint Price represents at least $0.001 price
         improvement over the NBB or NBO. See id.

Order interest but would not include the price or size.[20] The Exchange proposes that a

user may, but is not required to, designate an RML Order to be identified as RML Order

interest for purposes of the Retail Liquidity Identifier pursuant to proposed Exchange

Rule 11.22(b).[21]

Priority and Order Execution

Proposed Exchange Rule 11.22(c) would set forth the execution priority rules for

the Program.[22] Proposed Exchange Rule 11.22(c)(1) states that Retail Midpoint Orders

and RML Orders would only execute at the Midpoint Price. Proposed Exchange Rule

11.22(c)(3) states that Retail Midpoint Orders would execute against RML Orders in time

priority in accordance with Exchange Rule 11.10, except that RML Orders designated to

be included in the Retail Liquidity Identifier would have priority over RML Orders that

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[20]   As such, the Exchange explains that it would remove the Retail Liquidity
         Identifier previously disseminated through the MEMOIR Depth and MEMOIR
         Top data products and through the appropriate SIP after executions against Retail
         Midpoint Orders have depleted the available designated RML Order interest such
         that the remaining designated RML Order interest does not aggregate to form at
         least one round lot, or in situations where there is no actionable RML Order
         interest (such as when the market is locked or crossed), in order to indicate to
         market participants that there is no longer designated RML Order interest of at
         least one round lot available. See id.

[21]   Under Exchange Rule 11.8(c)(3), Pegged Orders, including Midpoint Peg Orders,
         are not eligible to include a Displayed instruction; however, as proposed, an RML
         Order would be eligible to include a Displayed instruction, which would be for
         the sole purpose of indicating to the Exchange that the user has designated the
         RML Order to be identified as RML Order interest for purposes of the Retail
         Liquidity Identifier pursuant to proposed Exchange Rule 11.22(b), and inclusion
         of the Displayed instruction would not indicate to the Exchange that the RML
         Order is to be displayed by the MEMX system on the MEMX Book. See id. at
         50413 n.18. A user would be able to designate RML Order interest for this
         purpose on an order-by-order basis or on a port-by-port basis. See id. at 50413.

[22]   In addition to the rule text explaining the Program's priority rules, proposed
         Exchange Rule 11.22(c) also provides two examples to further demonstrate how
         these priority rules would operate.

are not so designated. Thus, as proposed, because Retail Midpoint Orders are only

eligible to execute against RML Orders and orders priced more aggressively than the

Midpoint Price, other types of orders resting at the Midpoint Price that may be present on

MEMX (including those with time priority over an RML Order) would not be allowed to

execute against a Retail Midpoint Order and retail investors would not get the benefit of

being able to access that additional midpoint liquidity through the Retail Midpoint Order

type.

Proposed Exchange Rule 11.22(c)(2) provides that if there is: (A) a Limit Order[23]

of Odd Lot[24] size that is displayed by the MEMX system ("Displayed Odd Lot Order")

and that is priced more aggressively than the Midpoint Price and/or (B) an order that is

not displayed by the MEMX system ("Non-Displayed Order") and that is priced more

aggressively than the Midpoint Price, resting on the MEMX Book, an incoming Retail

Midpoint Order would first execute against any such orders pursuant to the Exchange's

standard price/time priority in accordance with Exchange Rule 11.9 and Exchange Rule

11.10 before executing against resting RML Orders.[25] Proposed Exchange Rule

11.22(c)(2) further provides that any such executions would be at the Midpoint Price

irrespective of the prices at which such Displayed Odd Lot Orders and/or Non-Displayed

Orders were ranked by the MEMX system on the MEMX Book. Thus, as proposed, any

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[23]   See Exchange Rule 11.8(b).

[24]   See Exchange Rule 11.6(q)(2).

[25]   The Exchange states that Displayed Odd Lot Orders and Non-Displayed Orders
         are the only types of orders that could rest on the MEMX Book at a price that is
         more aggressive than the Midpoint Price, as any displayed buy (sell) order that is
         at least one round lot in size would be eligible to form the NBB (NBO). See
         Notice, supra note 3, at 50415 n.37; Exchange Rule 1.5(z).

additional price improvement over the Midpoint Price would not accrue to the retail

investor's Retail Midpoint Order but rather would accrue to the Displayed Odd Lot Order

or Non-Displayed Order because those orders would execute at the Midpoint Price,

which is less aggressive than the price at which they were resting on the MEMX Book.

III.   Proceedings to Determine Whether to Approve or Disapprove SR-MEMX-2021-
          10 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the

Act[26] to determine whether the proposed rule change should be approved or disapproved.

Institution of such proceedings is appropriate at this time in view of the legal and policy

issues raised by the proposed rule change. Institution of proceedings does not indicate

that the Commission has reached any conclusions with respect to any of the issues

involved. Rather, as described below, the Commission seeks and encourages interested

persons to provide comments on the proposed rule change to inform the Commission's

analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[27] the Commission is providing notice

of the grounds for disapproval under consideration. The Commission is instituting

proceedings to allow for additional analysis of the proposed rule change's consistency

with Sections 6(b)(5)[28] and 6(b)(8)[29] of the Act. Section 6(b)(5) of the Act requires that

the rules of a national securities exchange be designed, among other things, to promote

just and equitable principles of trade, to remove impediments to and perfect the

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[26]   15 U.S.C. 78s(b)(2)(B).

[27]   Id.

[28]   15 U.S.C. 78f(b)(5).

[29]   15 U.S.C. 78f(b)(8).

mechanism of a free and open market and a national market system and, in general, to

protect investors and the public interest, and not be designed to permit unfair

discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the

Exchange Act requires that the rules of a national securities exchange not impose any

burden on competition that is not necessary or appropriate in furtherance of the purposes

of the Act.

The Commission asks that commenters address the sufficiency of the Exchange's

statements in support of the proposal, which are set forth in the Notice, in addition to any

other comments they may wish to submit about the proposed rule change. In particular, the

Commission seeks comment on the following aspects of the proposal and asks commenters to

submit data where appropriate to support their views:

1. What are commenters' views on proposed Exchange Rule 11.22(c)(2) and

the treatment of orders priced more aggressively than the Midpoint Price

when executing against Retail Midpoint Orders? In allowing Retail

Midpoint Orders to first execute against orders on MEMX that are priced

more aggressively than the Midpoint Price, the Exchange states that it

seeks to ensure that the priority of more aggressively priced orders over less

aggressively priced orders is maintained on the Exchange, consistent with

Exchange Rule 11.9.[30] However, the Exchange proposes that Retail Midpoint

Orders execute against any such Displayed Odd Lot Orders and/or Non-

Displayed Orders at the Midpoint Price instead of the more aggressive prices

at which such orders were ranked, which the Exchange explains is "because

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[30]   See Notice, supra note 3, at 50419.

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RMOs that submit Retail Midpoint Orders to the Exchange are, by selecting an order type that is specifically limited to executing at the Midpoint Price, expecting to receive an execution at the Midpoint Price and not at any other price(s)."[31] The Exchange further states that it "is proposing to address the needs of RMOs that focus their Retail Order trading on receiving executions at the Midpoint Price" and explains that "based on informal discussions with market participants, the Exchange believes that there are benefits associated with executing Retail Orders submitted to the Exchange at one price level rather than multiple prices, such as simplified record-keeping for retail investors and execution reporting by RMOs."[32] Aside from the benefits that may accrue to the RMO (i.e., the broker-dealer handling the retail investor's order) under the Exchange's proposal, the Exchange's proposal could deny the retail investor a further opportunity for price improvement as it would instead award that further price improvement to the resting Displayed Odd Lot Orders and/or Non-Displayed Orders. What are commenters' views on the Exchange's assertions and whether this aspect of the proposal could harm retail investors?

2. What are commenters' views on proposed Exchange Rule 11.22(c)(2) and (3), which would only allow Retail Midpoint Orders to execute against RML Orders (and orders priced more aggressively than the Midpoint Price) but would not allow Retail Midpoint Orders to execute against other

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[31]   See id. at 50415.

[32]   See id.

interest resting at the Midpoint Price, even if, for example, those orders have time priority over the RML Order(s)?[33] In other words, the proposed rule would bypass a non-RML Midpoint Peg Order with time priority to execute the Retail Midpoint Order against an RML Order (which also is a Midpoint Peg Order, but one that is "less aggressive" in that it is not willing to trade with any incoming order but instead is limited to only trading with retail interest submitted as Retail Midpoint Orders). In its proposal, the Exchange states that the "Program is designed to incentivize RMOs to submit Retail Midpoint Orders to the Exchange" and that the Program "is designed to facilitate the provision of meaningful price improvement (i.e., at the Midpoint Price) for orders of retail investors."[34] However, the proposal would prohibit Retail Midpoint Orders from interacting with non-RML Midpoint Peg Orders at the Midpoint Price, thus potentially limiting retail investors' opportunities to obtain meaningful price improvement, especially if RML Order interest were of insufficient size to fill the Retail Midpoint Order in full.[35] What are commenters' views of the Exchange's assertions? Do commenters believe that this aspect of the proposal could possibly harm retail investors? Do

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[33] As discussed above, certain non-RML Orders that are priced more aggressively than the Midpoint Price (and thus have price priority over RML Orders priced at the Midpoint Price) could interact with Retail Midpoint Orders subject to the conditions discussed above.

[34] See Notice, supra note 3, at 50418.

[35] The Exchange notes that it "typically has resting non-displayed liquidity priced to execute at the Midpoint Price." See id. at 50419.

commenters believe that precluding executions of Retail Midpoint Orders against non-RML Midpoint Peg Orders unfairly discriminates against such non-RML orders?

3. The Exchange further states that it "believes that it is appropriate and consistent with the Act to structure its [Program] such that Retail Midpoint Orders and RML Orders are only eligible to execute against each other at the Midpoint Price, so that Retail Midpoint Orders, which are entered on behalf of retail investors, receive price improvement that is meaningful by definition, as they are guaranteed, if executed, to execute at the Midpoint Price."[36] Do commenters agree with that assertion? Or would that same rationale apply if the Exchange also allowed Retail Midpoint Orders to execute against non-RML midpoint interest (because if the Exchange were to do so, Retail Midpoint Orders also would be "guaranteed, if executed, to execute at the Midpoint Price" when executing against such non-RML midpoint interest)?

4. The Exchange also states that it "believes that introducing a program that provides and encourages additional liquidity and price improvement to Retail Orders, in the form of Retail Midpoint Orders designed to execute at the Midpoint Price, is appropriate because retail investors are typically less sophisticated than professional market participants and therefore would not have the type of technology to enable them to compete with

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[36]   See id. at 50418.

such market participants."[37] Do commenters agree that Retail Midpoint Orders, if permitted to take liquidity against resting non-RML midpoint interest, would be competing with such market participants in a way that could negatively impact retail investors?

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."[38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40] Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[41]

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, any potential response

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[37] See id. at 50418-19.

[38] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[39] See id.

[40] See id.

[41] See Susquehanna Int'l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 446-47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

to comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission.

IV.   Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(5) and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[42]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Comments may be submitted by any of the following methods:

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[42]   Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MEMX-2021-10 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Numbers SR-MEMX-2021-10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of these filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only

information that you wish to make available publicly. All submissions should refer to File Number MEMX-2021-10 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

J. Matthew DeLesDernier,

Assistant Secretary.

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[43]   17 CFR 200.30-3(a)(57).